Central Law Journal.

ST. LOUIS, MO., OCTOBER 16, 1914.

THE PATIENCE OF THE PEOPLE IN THE MATTER OF REFORM OF JUDICIAL PROCEDURE.

There has never been in the history of this country any disposition on the part of the people to take over the control of judicial procedure. Whatsoever statutes attempting the formulation of a code of procedure have been enacted, they were the handiwork of lawyers. And for whatsoever defects are found therein lawyers are responsible.

We do not say the profession of any state has approved what has been done, but the patchwork in codes represents the idiosnycrasies or the selfishness of particular members of legislative assemblies who were lawyers. The general people have let the subject alone, very properly because they have not been impressed by the necessity of any tinkering or knew not how to effect their desire, if they were.

It has become recognized in legislative assemblies, that lawyers are needed to formulate laws and the ordinary laymen have left this work to them. It may be that they have listened to the pleas of lawyers as to the desirability of particular legislation and have not had sufficient knowledge of how it would work or what it would displace, to prevent *ad captandum* appeals in its favor.

But will they continue to exercise patience in regard to a subject of which there is such widespread complaint, in that it is so at outs with the running of a department of the government along practical lines? If they know that the consensus of view among lawyers is to simplify and make expeditious legal procedure, will they wait forever for lawyers to bring this about?

After a while, they may conclude that advocacy of these things must be taken as admissions against individual interest conflicting with public interest, and they will find a means to subserve the latter interest.

In this case it happens that such a short cut, as may be popular among people, who have not a thorough knowledge of the details of this reform, should be acceptable to lawyers and laymen alike. This short cut is to remit the whole question to the courts and hold them responsible for a just and speedy administration of the law.

It is the habit of a practical people to look to those who have to attend to particular things for the finding of a way and the prescribing of the means and methods therefor. And it is no answer to them to say that the law is a science that must be handled along the line of old precedent and in obedience to refinements argued out of particular instances. Let precedents and distinctions obtain, if need be, in the determination of rights, but not in the selection of remedies and their enforcement.

After all, what is a court for? It is for two things, one to adjudge the right and the other to adjudge the remedy therefor. It may be everlasting to do the former; it is a practical matter changing with circumstances to do the latter.

What, for example, is lost when a judge mistakes the particular procedure for arriving at a just result? The way he takes may be better, as a general rule, than what is prescribed. But, if there is a statute prescribing the way, some court has to reverse the judge, for finding a better way than the statute has found.

To courts entrusted to adjudge the right should be committed the duty to frame rules of procedure when a claim of that claimants may conform thereto, and right is made. It must be admitted that these rules should be made known so be advised in advance how to present their claims.

It is difficult, however, for the public to understand that rules of procedure

amount to anything more than the red tape of routine in any other governmental department. When this red tape has features about it, which prevent rather than facilitate the dispatch of business, the managers of the department are deemed inefficient if they do not correct these defects. It is not dreamed that legislative provisions shall dictate these features, and thus, if they work hardship, shall hang like millstones around the necks of officers endeavoring to work out the best results.

Corporation business is conducted upon similar principles and this is why men of administrative ability are selected for the heads of departments.

It may be admitted that there is a difference between the latter and courts, because private business is looking after its own interests, and this, in a measure, applies to all departments of the government other than courts. Courts look not after their own interests, but after the interests of others. For this reason rules prescribed by them should be made known to all and there should be a sort of fixedness about them. But practical direction is required for courts as well as for the executive branch of the government and the conduct of private business.

But fixedness in rules in no way obstructs justice if they merely facilitate its administration without expense, denial or delay. Therefore it should be left to those who administer justice the duty to make and change the rules of courts. It seems that a people telling judges to decide controversies justly, should require them to make all of the rules for bringing to their attention all appeals for justice. They ought to know what obstructs unduly these appeals and if they are unable to make rules in the premises, who should be supposed to be able?

A rule that has been prescribed should be followed, that the unwary be not denied a full and free approach to courts, but, if a particular rule is found to work out badly in practice, it should be changed to govern future cases.

In this way there necessarily would come about an approach to perfection in the rules of courts. And the science of judicial procedure would advance along practical lines. One judge may not work it out, but conventions of judges where the meaning of instances could be studied and changes in rules prescribed may do this.

Now that legislation is proposed for so very many things, much of it like bills that some lawyers in legislatures propose because they have lost particular cases, why should not the whole question of rules in administering justice be left to impartial tribunals, that are every day struggling with legislative rules? When we complain that others are seeking laws for every ill, perhaps, we might ask ourselves whether or not the cue has been taken from interested lawyers with their special bills. The remedy seems so simple, it is difficult to understand why it is so long postponed.

We note with pleasure, in this connection, that the retiring president of Missouri State Bar Association, in his excellent address, urges that there be vested in the courts the right to make rules in pleading and practice, as also is advocated by the American Bar Association. Indeed, we know of little open opposition to this course.

NOTES OF IMPORTANT DECISIONS

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE IN IRRITATING A BULL.—The Supreme Court of Washington seems in a late case to go beyond all reasonable limits in submitting to a jury as a question of fact whether certain conduct amounted to contributory negligence such as barred recovery by plaintiff. Gunderson v. Bieren and Wife, 142 Pac. 685.

The facts show that an employee and his employer's son went into the country to bring in a bull, which his employer, a butcher, had purchased, the employee being an experienced stockman. The defendant, seller, and em-

ployee and his employer's son went into the corral after the bull and drove him from where he was with a number of cows, the bull shaking his head as if angry. The seller used a club in driving him out. He told employee the bull was not mean, and he was no more afraid of him than he was of employee.

While they were dickering about the price the bull went into another inclosure where cows were and employee, then being on horseback went in after him, telling employer's son he would go in because his horse was faster than his. The bull refusing to move he first whipped him and then put his dog on him. The dog nipped his heels a few times and the bull suddenly turned and charged the horse, throwing him on the employee and causing his death.

There was much testimony to show the bull was vicious to the knowledge of the seller, and especially towards horses. The court sustained a verdict in favor of deceased's wife.

The court thought that cited cases of maltreatment or voluntary irritation of a dog causing him to bite having nothing to do with a dog's disposition, did not control this case, as "it cannot be said as matter of law or as a result of common observation that bulls as a class are dangerous," and there was the express statement of the seller that this bull was not "mean."

This reason is a sort of non sequitur to the plea of contributory negligence. If the dog cases had no reference to their disposition, because the biting was provoked, so also might be said the attack of the bull. Though bulls as a class may not be judicially known as dangerous, they may be known as dangerous when provoked, and deceased seemed to know this, because he went in to drive him out because he had the "faster horse." It was reasonably to be expected that a bull though not mean would attack if provoked, and by every fair inference deceased admitted this to be true, and took chances of escape on his "faster horse." This seems a case—all too common—where the court sustained a verdict without legal evidence back of it under the convenient plea that the jury had decided.

INSURANCE—RIGHT OF REINSTATEMENT ABSOLUTE UPON COMPLIANCE WITH NECESSARY PROOF.—Indiana Appellate Court holds that where a holder of a benefit certificate applied for a reinstatement after lapse of his policy for non-payment, the company could not refuse to renew the policy, because after it was mailed, but before it reached the company, insured was killed by an accident. Prudential Ins. Co. v. Union Trust Co., 150 N. E. 505.

It was said the position of the applicant "was that of one demanding a right, which upon the condition precedent in the contract to its ripening to a complete obligation, it was not within the power of (the company) to withhold."

The court distinguishes this case from those where no application is made until after death or where there was not the requisite proof of insurability satisfactory to the company. In this case there was recommendation by the examiner that reinstatement be allowed. Therefore it was held, that the reinstatement should be allowed, with it to relate back to the time it lapsed.

PRACTICE—TRANSFERENCE OF CASE FROM EQUITY TO LAW SIDE OF COURT UNDER NEW EQUITY RULES.—Rule 22 of Rules of Practice for the Courts of Equity of the United States, provides that where it appears that a suit in equity should have been brought at law, it may be transferred to the law side of the court and there be proceeded with.

In Watson v. Huntington, 215 Fed. 472, decided by Second Circuit Court of Appeals, this rule was applied in a suit by thirty-eight plaintiffs against a single defendant to recover damages for fraud, the gist of the action being in tort.

The court below ordered the bill dismissed for lack of equity and because of multifariousness, but the Circuit Court of Appeals thought there was a legal cause for action stated, but objection not being made by defendant as upon the various plaintiffs suing at law upon the same cause of action, there was no right for plaintiffs to unite in equity for the purpose of avoiding a multiplicity of suits.

The court further thought the plaintiffs should not be turned out of court, "but each should be allowed to alter the complaint by adopting such parts thereof as he may be able to utilize as a basis for his complaint at law." Therefore, the order dismissing the bill was reversed and the cause was remanded, with directions to transfer the case to the law docket and to permit the filing of an altered complaint by each of the plaintiffs.

Rule 22 literally construed might be claimed to mean that for one suit in equity transferred another should exist on the law side, but here the effect of the ruling seems to be that there shall be thirty-eight different suits at law for one on the equity side. When the thirty-eight were wrongfully joined in the equity cause it would look like they did not get into court

at all and, therefore, the one suit they brought could not be transferred and there split up into many suits. The rule of transfer in such case would not be keeping the original suit in court at all, but each suitor picks out of it what applies to him alone and the substance of the original suit is preserved in the sum of the allegations in distinct suits. The ruling, however, represents a broad purpose in the new equity rules, though it would seem, that something should have been said about costs in the filing of so many complaints to take the place of one original complaint.

"THE LAW OF THE CASE."*

Whether wisely or unwisely, the system of Anglo-Saxon jurisprudence is built upon precedent rather than upon principle, and a decision of a court of last resort once made, whether in conformity with well-recognized principles of law supposed to guide courts in arriving at their conclusions, or in flagrant violation of all known prnciples, becomes the "law of the land" for that jurisdiction, especially where the court conceives that it may have become a "rule of property;"[1] and we seem to be fast arriving at that stage in the development and decline of the Roman civil law when in its decaence, the "Law of Citation" was enacted,[2] and which, in the time of the Glossators, degenerated into the "Rule of Thumb;" when the lawyers, chained by tradition and cramped by the demands of daily practice, were quite satisfied with a stale rehashing of well-known ideas, and sought only for illustrative cases which were supposed to explain some legal principle—but which frequently leave the ruling doctrine as much muddled and uncertain as ever. The legal profession and the bench, alike, becoming blind victims of the fetish of authority-worship, developed the rule of taking for law whatever some authority had once asserted, and, when there were opposing opinions

*The doctrine of "The Law of the Case" is discussed by Mr. Kerr from another angle in an issue of October 2, 1908, Vol. 67, pp. 255-261.

(1) A good illustration is found in the doctrine of the foreshore, as enunciated by the corrupt judiciary of the times of King Charles I, which doctrine was historically, legally and fundamentally wrong; and yet it was followed in this country until quite recently. See elucidating and admirable discussion by Frederic R. Coudert, of the New York bar, in "Certainty of Justice," pp. 205-243.

Another apt illustration is found in the California doctrine of Trust Deeds, which is thought to be out of harmony with the doctrine in all the other states in the Union. It has none of the features of a mortgage, except that it was executed to secure an indebtedness; a suit in equity for foreclosure and sale will not lie; there can be no redemption from sale; there can be no judgment for deficiency; it is not a debt to be presented to the administrator of a deceased grantor, and is not subject to the probate laws of the state. Those curious to follow this peculiar doctrine in all its departments will find the following cases helpful: Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Cormerais v. Genella, 22 Cal. 116; Green v. Butler, 26 Cal. 595; Barr v. Schroeder, 32 Cal. 609; Fuquay v. Stickney, 41 Cal. 583; Sprague v. Edwards, 48 Cal. 239; Odd Fellows Sav. & C. Bk. v. Harrigan, 53 Cal. 229; Grant v. Burr, 54 Cal. 298; Bateman v. Burr, 57 Cal. 480; Kennedy v. Dunn, 58 Cal. 339; Durkin v. Burr, 60 Cal. 360; Carey v. Brown, 62 Cal. 373; Bostwick v. McEvoy, 62 Cal. 496; Savings & L. Soc. v. Deering, 66 Cal. 281, 5 Pac. 353; Scott v. Sierra Lumber Co., 67 Cal. 131, 7 Pac. 131; Partridge v. Shepard, 71 Cal. 470, 12 Pac. 480; More v. Calkins, 85 Cal. 177, 24 Pac. 729; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232, 24 Pac. 790; Watson v. Sutro, 86 Cal. 500; 24 Pac. 172; 25 Pac. 64; Watkins v. Bryant, 91 Cal. 492, 27 Pac. 775; Felton v. LeBreton, 92 Cal. 457, 28 Pac. 490; More v. Calkins, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583; Chapman v. Bank of California, 97 Cal. 155, 31 Pac. 896; Powell v. Patison, 100 Cal. 234, 34 Pac. 676; Savings & L. Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922; Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813; Camp v. Land, 122 Cal. 167, 54 Pac. 839; Balfour-Guthrie Inv. Co. v. Woodworth, 124 Cal. 169, 56 Pac. 891; Darrough v. Herbert Kraft Co. Band, 125 Cal. 272, 57 Pac. 983; Staacke v. Belle, 125 Cal. 309, 57 Pac. 1012; Hazen v. Nicholls, 127 Cal. 327, 58 Pac. 816; Hodgkins v. Wright, 127 Cal. 688, 60 Pac. 431; Citizens Bank v. Los Angeles Iron & S. Co., 131 Cal. 187, 82 Am. St. Rep. 341, 63 Pac. 462; Copsey v. Sacrament Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7; Banta v. Wisse, 135 Cal. 277, 67 Pac. 129; Mayhall v. Eppinger, 137 Cal. 5, 69 Pac. 489; McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748; Meetz v. Mohr, 141 Cal. 667, 75 Pac. 298; Penryn Fruit Co. v. Sherman-Worrell Fruit Co., 142 Cal. 643, 76 Pac. 484; Curtin v. Krohn, 4 Cal. App. 131, 87 Pac. 243; Roberts v. True, 7 Cal. App. 379, 94 Pac. 392.

(2) A. D. 426, by Theodosius II and Valentinian III.

on record, deciding by the mere number of opinions upon one side or the other, without giving any consideration to the learning and rectitude of the man or the justness of the opinion. Dogma and authority-worship having superseded reason and science, the doctrine of "communis opinio," or the weight of opinion, that is, the rule that the recorded opinion which had the greater number of adherents was the sound one, prevailed. Under this rule the judge decided, not by the aid of his own knowledge and reflection and reasoning, but by following that opinion which numbered amongst its adherents a majority of accredited names, and when the number was even, Papinion's name controlled. Later, when Accussius rose to fame, while his star remained in the ascendant, his opinion was treated as the law, in the absence of an express statute or established custom on the subject; and a statute was enacted that Dinus' opinion should stand as the law in all those cases where, on a given point, Accussius had expressed two opposite opinions. Afterwards Bartolus came into fame, and his opinion supplanted that of Accussius.[3]

At this time, when the product of Roman juristic thought had passed its prolific and brilliant stage, the law schools of the time, the sole aim of which was to prepare practitioners, followed the trend of the times and filled the minds of their students with the "rule of thumb." The law schools of this country to-day seem to have fallen into the same decadence and, with a single exception,[4] chained to blind precedent, seek to teach the law by the study of "selected cases"—which at best can apply fundamental principles and general rules of law in a limited degree only, dependent upon the particular facts and restricting circumstances in each particular case—instead of seeking to have their students master those fundamental principles in the various branches of American jurisprudence which must, or should, control all cases, however variant the facts; concentrate the entire time and attention of the students upon the "stupendous accumulation of judicial detritus which threatens our entire legal system with a menace that must not be underestimated,"[4a] instead of endeavoring to develop in the minds of the students a comprehensive knowledge of the science of the law logically by inculcating fundamental principles and the method of their proper application to a given state of facts.

In this country a decision in a cause submitted to the highest court of a jurisdiction—state or nation—once made is as unalterable as the laws of the Medes and Persians, so far as that cause is concerned, for it is the invariable rule, in states and nation, alike, that a question once considered and decided by a final appellate court cannot be re-examined at any subsequent stage of the same cause;[5]

(3) Continental Legal History Series, vol. I, "General Survey," pp. 142-144.

(4) The Dwight Law School, New York City.

(4a) 'Systematic Survey of the Law and Principles of Legal Surety" p. XII. (Modern Legal Philosophy Series, Vol. 1.)

(5) Smith v. Goethe, 159 Cal. 628; Ann. Cas. 1926, p. 1205, 115 Pac. 223; Wabash, St. L. & Pac. R. Co., 115 Ill. 601, 6 N. E. 412; Hart v. Stribling, 25 Fla. 445, 6 So. 455; Hall v. Wright, 138 Ky. 71, Ann. Cas. 192A, p. 1255, 127 S. W. 516; Roesel v. State, 62 N. J. L. 369, 41 Atl. 833; Hunt v. Hunt, 109 Mich. 401, 67 N. W. 510; Setzer v. Setzer, 129 N. C. 296, 40 S. E. 1037; Perry v. Western & C. R. Co., 129 N. C. 333, 40 S. E. 191; Jones v. Wilmington & W. R. Co., 131 N. C. 137, 42 S. E. 559; Arrington v. Arrington, 131 N. C. 146, 92 Am. St. Rep. 769, 42 S. E. 554; Holeran v. Mersil, 91 Va. 142, 21 S. E. 658; Furth v. Snell, 13 Wash. 665, 43 Pac. 935; Finney v. Guy, 111 Wis. 299, 87 N. W. 255; Johnston v. Jones,. 66 U. S. (1 Black) 209, 17 L. Ed. 117; United States v. The Muestra Senora De Regla, 108 U. S. 92, 27 L. Ed. 662, 2 Sup. Ct. Rep. 287; Chaffin v. Taylor, 116 U. S. 567, 29 L. Ed. 727, 6 Sup. Ct. Rep. 518; Hill v. Chicago & E. R. Co., 140 U. S. 52, 35 L. Ed. 331, 11 Sup. Ct. Rep. 690; Northern Pac. R. Co. v. Ellis, 144 U. S. 458, 36 L. Ed. 504, 12 Sup. Ct. Rep. 724; Re Sanford F. & T. Co., 160 U. S. 247, 40 L. Ed. 414, 16 Sup. Ct. Rep. 291; Great Western Tel. Co. v. Burnham, 162 U. S. 339, 40 L. Ed. 991, 16 Sup. Ct. Rep. 850; Thompson v. Maxwell L. G. & R. Co., 168 U. S. 451, 42 L. Ed. 339, 18 Sup. Ct. Rep. 121; Illinois ex rel Hunt v. Illinois Cent. R. Co., 184 U. S. 77, 46 L. Ed. 440, 22 Sup. Ct. Rep. 300.

such decision becomes "the law of the case" and is final, so long as the facts remain unchanged and the evidence substantially the same; a second appeal is authorized where the cause is remanded and a new trial ordered, but such second appeal brings up for consideration by the appellate court such things only as occurred subsequently to the order of remand, and does not authorize an inquiry into and an examination anew into the merits of the original judgment, decree or order, or into any questions which were properly before the court on the first appeal, or could have been properly presented to the court on that appeal.[6]

Concisely stated, the doctrine of "the law of the case" is that an adjudication by a final court of appeal becomes the law of the case upon all subsequent trials thereof and proceedings therein, and is regarded as a wholesome rule and should be enforced,[7] where no new proof is introduced at the retrial on remand;[8] but questions of fact are not within the rule, and anything an appellate court may have said in respect thereto on a former appeal cannot bind the trial court on a retrial.[9] From this it follows that where an appellate court states a principle or rule of law necessary to the decision—and some of the cases go even farther than this; but they are not thought to be sound in so holding—that principle or rule of law must be adhered to in all subsequent proceedings in that cause,[10] unless the facts on the retrial are substantially different

(6) See cases cited below.

(7) Le Croix v. Malone, 157 Ala. 434, 47 So. 725; Consaul v. Cummings, 30 App. D. C. 540; Fry v. Rodzinski, 121 Ill. App. 303, affirmed 219 Ill. 526, 76 N. E. 694; Pittsburgh C. C. & St. L. R. Co. v. Lightheiser, 168 Ind. 438, 78 N. E. 1033; Hocker v. Louisville & N. R. Co., 29 Ky. L. Rep. 842, 96 S. W. 526; In re Kline's Estate, 35 Mont. 185, 88 Pac. 798; Kline v. Fraser, 35 Mont. 186, 88 Pac. 798; Kierman v. Eidlitz, 115 N. Y. App. Div. 141, 100 N. Y. Supp. 731; Patillo v. Allen-West Commission Co., 47 C. C. A. 637, 108 Fed. 723.

(8) Atlantic & B. R. Co. v. Brown, 129 Ga. 622, 59 S. E. 278; Central Georgia R. Co. v. Augusta Brokerage Co., 2 Ga. App. 511, 58 S. E. 904; Olympia Min. Co. v. Kerns, 15 Idaho 371, 97 Pac. 1031; Cleveland C. C. & St. L. R. Co., 123 Ill. App. 477; Gray v. Merchants Ins. Co., 125 Ill. App. 370; Coppes v. Union Nat. Sav. & L. Assoc., 40 Ind. App. 121, 79 N. E. 533, 80 N. E. 984; Good & Co. v. Central Coal & C. Co., 7 Ind. Tr. 268, 104 S. W. 613; Hensley v. Davidson, 135 Iowa 106, 112 N. W. 227; Sinclair's Admr. v. Illinois Cent. R. Co., 129 Ky. 828, 112 S. W. 910; Mead v. Mead, 31 Ky. L. Rep. 70, 101 S. W. 330; Louisville & N. R. Co. v. Molloy's Admr., 32 Ky. L. Rep. 745, 107 S. W. 217; Middlesborough v. Coal & Iron Bank, 33 Ky. L. Rep. 469, 110 S. W. 355; Middlesborough Town & L. Co. v. City of Middlesborough, 33 Ky. L. Rep. 961, 110 S. W. 355; Barkley v. South Atlantic Waste Co., 149 N. C. 287, 62 S. E. 1073; Easterly v. Jackson, 36 Mont. 205, 92 Pac. 480; In re Cook's Estate, 125 N. Y. App. Div. 114, 109 N. Y. Supp. 417; Isbell-Porter Co. v. Heineman, 126 N. Y. App. Div. 713, 111 N. Y. Supp. 332; Travis v. Hann, 128 N. Y. App. Dic. 77, 112 N. Y. Supp. 463; Forrest v. McBee, 78 S. C. 105, 58 S. E. 955; Colorado Salt Co. v. San Jacinto Oil Co., (Tex. Civ. App.), 105 S. W. 822; Norfolk & W. R. Cov. Duke, 107 Va. 764, 60 S. E. 96; Wheeler v. City of Aberdeen, 47 Wash. 405, 92 Pac. 135; Sullivan v. Seattle Electric Co., 51 Wash. 71, 97 Pac. 1109; Johnson v. Gould, 62 W. Va. 599, 59 S. E. 611; Weidner v. Standard Life & Accident Ins. Co., 132 Wis. 624, 113 N. W. 50; Appleton Water Works Co. v. City of Appleton, 136 Wis. 395, 117 N. W. 816.

(9) Hartford Fire Ins. Co. v. Enoch, 79 Ark. 475, 96 S. W. 393.

(10) Young v. Ruhweddel, 132 Mo. App. 721, 112 S. W. 993.

Demurrer held improperly sustained in an action on an employer's liability policy to a reply alleging a contract between complainant and employer as a basis for the purchase of the policy sued on, becoming the law of the case on retrial authorizes the introduction in evidence of the contract between plaintiff and his employer.—Fidelity and Casualty C. v. Southern R. News Co., 31 Ky. L. Rep. 725, 103 S. W. 297. See to similar effect State v. Wisconsin Cent. R. Co., Wis., 113 N. W. 952.

Instruction approved on appeal is the law of the case on a subsequent trial on remand.—Austin v. Collier, 131 Ga. 295, 62 S. E. 196; Illinois Cent. R. Co. v. Houchins, 31 Ky. L. Rep. 93, 101 S. W. 924.

Instruction given by the trial court which is contrary to the law of the case as laid down by an appellate court on a former appeal, is error. Owensboro Wagon Co. v. Hall, 149 Ala. 210, 43 So. 71.

Tacit approval of an instrument to which the appellate court has its attention particularly directed, becomes the law of that case on all subsequent proceedings therein.—Louisville & N. R. Co. v. Fowler, 32 Ky. L. Rep. 1021, 107 S. W. 703.

United States Supreme Court dismissing appeal from state court on the ground that the state court had no jurisdiction over the subject-matter, becomes the law of the case in the state court.—Richardson v. Ainsa, 11 Ariz. 359, 95 Pac. 103.

from those on the first trial,[11] and such former decision is to be followed in its spirit as well as its letter,[12] even though in a subsequent consideration of the case the judges of the appellate court are convinced that their former decision was fundamentally erroneous.[13]

This rule, in all its strictness, applies, however, it seems, in those cases only in which the judges of the appellate court agree upon questions of law; for if they fail to so agree the decision does not become the law in the case, and cannot serve as a rule or guide to the lower court upon the retrial of the cause.[14]

On second appeals the final court of appeals is subject to and bound by this rule the same as the trial courts,[15] and must apply and enforce the decision in the first appeal in its spirit as well as its letter,[16] even though additional assignments of error are made raising, upon the second appeal, questions which were not presented on the first appeal.[17] The rule, however, is inapplicable in all those cases in which the facts proved at the retrial, and presented on the subsequent appeal, are materially different from those proved at the first trial and presented on the first appeal, and on which the decision was founded:[18] e. g., where on the retrial after remand the issues were changed and much of the evidence admitted on the first trial was excluded on the retrial, in which case the decision of the appellate court on the first appeal is not the law of the case on the second appeal.[19]

Some of the cases go to the length of holding that all questions presented by the record on the first appeal are concluded on second and subsequent appeals, whether passed upon in the opinion or not;[20] but this is thought to be carrying the rule of the doctrine of the law of the case to an unpermissible length. The better doctrines, as well as the weight of decision, is to the effect that the rule should be confined exclusively to questions properly presented in the record and discussed at bar, and to such questions as are actually decided, or could have been properly presented and decided;[21] and does not

(11) Bank of Commerce v. New York Ins. Co. 131 Ga. 312, 62 S. E. 179; Williams v. Butterfield, 214 Mo. 412, 114 S. W. 13.

Evidence held not sufficient to sustain verdict and new trial ordered for that reason, where evidence on retrial is substantially same as on first trial, a direction of verdict for the defendant by the trial judge is proper.—Block v. Great Northern R. Co., 106 Minn. 285, 118 N. W. 1019.

(12) Union Cent. Life Ins. Co. v. Burnett, 136 Ill. App. 187.

(13) Tally v. Canahl, 151 Cal. 418, 90 Pac. 1049; Grand Cent. Min. Co. v. Mamoth Min. Co., 36 Utah 364, Ann. Cas. 1912A, p. 254, 104 Pac. 573.

(14) Larsen v. Leonardt, 8 Cal. App. 226, 96 Pac. 395.

(15) Tally v. Ganhl, 151 Cal. 418, 90 Pac. 1049; International Boom Co. v. Rainy Lake River Boom Co., 104 Minn. 152, 116 N. W. 221; Merkel v. Lazard, 124 N. Y. App. Div. 934, 109 N. Y. Supp. 577; Baines v. Coos Bay R. & E. R. Nav. Co., 49 Ore. 192, 89 Pac. 522; Horn v. La Cross Box Co., 131 Wis. 384, 111 N. W. 522.

Final judgment by the supreme court upon some of the issues submitted on appeal, the balance being remanded to the lower court for retrial, the issues finally adjudicated on the first appeal will not be reviewed on a subsequent appeal.—Huntington v. Westerfield, 119 La. 615, 44 So. 317.

Matters determined or conceded on the first appeal will not be considered on the second appeal.—Roth v. Mutual Reserve Life Ins. Co., 89 C. C. A. 262, 162 Fed. 282.

(16) Union Cent. Life Ins. Co. v. Burnett, 136 Ill. App. 187.

(17) Leeds v. Townsend, 124 Ill. App. 532, affirmed 81 N. E. 1069.

Binding with respect to all questions raised and passed on, and also as to all questions which might have been raised by cross-error but was not.—Mariner v. Ingraham, 127 Ill. App. 550.

(18) Adams v. Thornton, 5 Cal. App. 455, 90 Pac. 713; Austin v. Central Georgia R. Co., 3 Ga. App. 775, 61 S. E. 998; Horn v. Arnold, Schwinn & Co., 124 Ill. App. 185.

Otherwise where the evidence is conflicting but much the same as on the first appeal.—Toledo St. L. & W. R. Co. v. Reardon, 86 C. C. A. 366, 159 Fed. 366.

(19) Pacific Mills Co. v. Inman, 50 Ore. 22, 90 Pac. 1099.

(20) National Life Ins. Co. v. Anderson, 31 Ky. L. Rep. 415, 102 S. W. 323.

(21) Anderson Carriage Co. v. Gilmore, 129 Mo. App. 644, 108 S. W. 594; Hammock v. City of Tacoma, 44 Wash. 623, 87 Pac. 924; Cope v. Plymoth Cong. Church, 130 Wis. 174, 109 N. W. 928; Patillo v. Allen-West Commission Co., 47 C. C. A. 637, 108 Fed. 723.

apply to matters not presented nor decided.[22] It is submitted that in order to conclude a question and make the decision on the first appeal the law of the case there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and that any part of an opinion on the first appeal which was not needful to the ascertainment and adjudication of the questions between the parties, is mere dictum, and possibly obiter dictum (for there is clearly a distinction to be drawn between dicta), and not binding either on the trial court or the appellate court.[23] The rule should never extended to mere dicta or obiter dicta or intimations of opinion of a judge in a written opinion which may be thought to foreshadow the opnion of the court on questions not properly raised or not presented and argued at bar, or if raised and presented not necessary to the decision of the question which is finally determinative of the cause decided.[24] But the discussion of the kinds or classes of dicta and their relative importance and binding effect, or useless excrescence in a written opinion of an appellate court, is a subject that will require an entire article to present.

The rule of the law of the case does not apply in all its force to inferior appellate courts, and hence a decision of a district court of appeal, or other intermediate appellate court, is not the law of the case on appeal to the supreme court or other higher court of appeal;[25] it is binding on the trial court and other inferior courts, only.

(22) Indianapolis & St. L. R. Co. v. Taylor, 38 Ind. App. 592, 80 N. E. 436.

A declaration of law copied into the record upon which the appellate court expresses no opinion does not become the law of the case.—Vincent v. Means, 207 Mo. 709, 106 S. W. 8.

(23) Carroll v. Carroll's Lessees, 57 U. S. (16 How.) 275, 287, 14 L. Ed. 936, 941.

(24) Patillo v. Allen West Commission Co., 47 C. C. A. 637, 108 Fed. 723.

(25) Denver Consol. Electric Co. v. Walters, 39 Colo. 301, 318, 89 Pa. 815, 820.

In a California case, where the cause had been appealed to the district court of appeal, was remanded for a retrial, again appealed to the district court of appeal, and taken from there to the supreme court, the latter court held that the decision of the district court of appeal on the first appeal was not the law of the case on a subsequent appeal to the supreme court.[26] Among other interesting things the California Supreme Court say: "Appellate's contention is that upon the former appeal the evidence then and there before the appellate court was reviewed and declared to be sufficient to sustain certain findings; that upon the same evidence the trial court again made the same findings, when in point of law it should have been controlled in its determination upon these matters by the utterances of the appellate court in discussing the evidence upon the former appeal. In this, the appellant mistakenly seeks unwarrantably to extend the doctrine of the law in the case. The doctrine of the law of the case presupposes error in the enunciation of a principle of law applicable to the facts of a case under review by an appellate tribunal. It presupposes error because, if the governing principle of law had been correctly declared, there would be no occasion for the intervention of the doctrine. The sole reason for the existence of the doctrine is that the court, having announced a rule of law applicable to a retrial of facts, both parties upon that retrial are assumed to have conformed to the rule and to have offered their evidence under it. Under these circumstances it would be a manifest injustice to either party to change the rule upon the second appeal. But, since the rule owes its very existence to error, it is not one whose extension is looked upon with favor. The ruling is adhered to in the single case in which it arises, is not carried into other cases as a precedent, and the

(26) Allen v. Bryant, 155 Cal. 256, 258, 100 Pac. 704.

doctrine is rarely, and in a very limited class of cases, applied to matters of evidence, as distinguished from rulings at law.[27] The narrow class of cases in which the doctrine will be held to apply to evidence and the rigid limitation upon the application of the doctrine, will be found well expressed in Wallace v. Sisson.[28] It is there said: 'But when the fact which is to be decided depends upon the credit to be given to the witnesses whose testimony is received, on the weight to which their testimony is entitled or the inferences of fact that are to be drawn from the evidence, the sufficiency of the evidence to justify the decision must be determined by the tribunal before which it is presented, and is not controlled by an opinion of the appellate court that similar evidence at a former trial of the cause was insufficient to justify a similar decision. * * * And if, in the opinion which it renders, it assumes that the evidence sustains any fact, it is only the opinion of the court, and not the finding of that fact.'"

JAMES M. KERR.

Los Angeles, Cal.

(27) Wixson v. Devine, 80 Cal. 385, 22 Pac. 224; Mattingly v. Pennie, 105 Cal. 514, 45 Am. St. Rep. 87, 39 Pac. 200. See, also, notes, 27 Am. Dec. 631; 15 Am. St. Rep. 143.

(28) 114 Cal. 42, 45 Pac. 1000.

PRINCIPAL AND AGENT--COMMISSIONS.

WELEETKA LIGHT & WATER CO. v. BURLESON.

Supreme Court of Oklahoma. Aug. 25, 1914.

142 Pac. 1029.

A willful and fraudulent failure to account for moneys or property coming into the hands of an agent disentitles him to any compensation for his services; and a lesser degree of the wrong may disentitle him to more than reasonable compensation for the services performed or justify a deduction from the amount named in the contract of employment.

THACKER, C. Plaintiff in error will be designated as "defendant" and defendant in error as "plaintiff," in accord with their respective titles in the trial court.

On May 9, 1910, plaintiff filed his bill of particulars in the court of a justice of the peace, recovering judgment thereon on May 31, 1910, for $153.50 against defendant; and on March 9, 1911, in the county court, to which defendant had appealed, he obtained a verdict of a jury for the same amount. Plaintiff in effect claimed that he, as agent, served defendant (whose plant and home office appears to have been at Waleetka) in selling and accounting for its ice and distilled water, and in matters incident thereto, at Okemah, from September 2, to December 14, or 15, 1909, at $50 per month and from March 1, to May 4, 1910, at $75 per month under contract made through its manager, J. H. Steger; that defendant paid him for his services in 1909, except a balance of $35 still owing; that defendant paid him $41.10, leaving a balance of $118.50 owing, for his services in 1910; and that he is entitled to recover said sum of $153.50 as the aggregate of the said balances owing.

(3) Defendant appeared only specially to question the summons and service thereof in the justice's court, but, in the county court, answered by general denial and plea of payment, and upon the trial in the latter court claimed that there was no balance due plaintiff, but, to the contrary, he was more than $700 in arrears with it on account of moneys collected for it and wrongfully retained by him and ice and other property furnished him and unaccounted for; but there was no plea of counterclaim or set-off and no evidence given upon the plea of payment by the defendant, so any cross-examination of the plaintiff in respect to any matter not within the issue made by the general denial of his allegations of a total balance of $153.50 owing him for said services was improper. However, this issue was broad enough to permit inquiry as to the manner and form in which plaintiff discharged the duties of his agency and as to whether he had faithfully or otherwise discharged the same, or had in any respect breached his contract.

(2) Although slight misconduct in this regard may not be an absolute bar to recovery, a willful and fraudulent failure to account for moneys or property coming into his hands as such agent would undoubtedly disentitle him to any compensation whatever for his services; and a failure in a lesser degree of the wrong to faithfully and fully perform such duties of his employment may entitle defendant to a deduction from the amount of compensation claimed or disentitle plaintiff to recover more more than reasonable compensation for the services performed without a plea of counterclaim or set-off; this being dependent upon the nature or character and extent of the failure.

(1) The agent owes his principal diligence, integrity and skill; and it is generally held that an agent forfeits all his rights to compensation by willfully neglecting to keep and render accurate accounts of his agency, or by rendering false accounts, 31 Cyc. 1456-1458, 1470-1475, and 1524-1526; 1 Wait's Actions & Defenses, 249-254 and 270, 271; Sumner v. Reicheniker, 9 Kan. 320; Sipley v. Stickney, 190 Mass. 43, 76 N. E. 226, 5 L. R. A. (N. S.) 469, and notes to last report, 112 Am. St. Rep. 309, 5 Ann. Cas. 611; Doss v. Board of Directors of L. P. L. Dist., 96 Ark. 451, 132 S. W. 443; Little v. Phipps, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046; Redwine v. Continental Realty Co., 184 Fed. 851, 107 C. C. A. 175; Witte v. Storm, 236 Mo. 470, 139 S. W. 384; Myers v. Walker, 31 Ill. 354; Millingar v. Hartupee, 53 Pa. 362; Brannan v. Strauss, 75 Ill. 234; Segar v. Parrish, 20 Grat. (Va.) 672.

(4, 5) On cross-examination plaintiff in effect said that in the discharge of his duties he collected moneys for defendant and deposited the same in his own name in the bank until the latter part of March, or in April, when he deposited it in the name of the Crystal Ice & Cold Storage Company, acting in accord with directions of defendant's manager in each instance; but his testimony was not full and clear nor free from other defects in respect to how he had performed the service for which he sought compensation; and defendant, evidently for the purpose of showing gross and fraudulent unfaithfulness in his services and that he had wrongully retained at least enough of his collections and converted or neglected to care for enough of defendant's property to more than set off the balance of the debt claimed, without in any manner accounting therefor, further cross-examined him as follows:

"Q. You say you put the money in the bank? A. Yes sir. Q. What did you do with it then? A. I paid freight with part of it and paid feed bills, and Steger got part of it. Q. How much of it did you keep? A. I never kept any of it. Q. How much did you pay Steger? (Objected to as immaterial. Objection sustained.) Q. If you paid to Steger any part of this money which you collected and which you placed in the bank in your own name, state how you paid it, whether by cash or by check? (Objected to as immaterial. Objection sustained by the court. To which ruling of the court the defendant excepts.)"

Under section 4233, Stat. 1893, as amended by L. 1905, p. 327 (section 5070, Rev. Laws 1910), the objection of "immateriality" should be deemed sufficiently comprehensive to include the objection of "improper cross-examination;" and it should be here stated that the direct examination immediately preceding the same had not touched on any question of counter-claim or set-off (which are not pleaded) nor upon any question of payment (to which it does not appear the questions disallowed were pertinent), and further that, while it is within the discretion of the court to permit the cross-examination of a party to extend beyond the matter inquired about in the direct examination, the general rule in this regard is the same as in examining other witnesses. Jones on Evidence (2d Ed.) § 836. But it does appear that the purpose of the disallowed questions included the purpose to show unfaithfulness and fraudulent remissness of duty in the very service for which plaintiff had testified in his direct examination he was entitled to compensation and to discredit his testimony that he had performed the service. At least, the questions do not appear to have been immaterial; but logically tended to aid the trial court in determining the issues.

In 1 Jones, Commentaries on Evidence, § 135, p. 659, in discussing the subject of "relevancy," it is said:

"Unless excluded by some rule or principle of law, any fact may be proved which logically tends to aid the trier in the determination of the issues."

In our opinion the questions disallowed were proper cross-examination and therefore "material."

Because of the error in disallowing the said questions, this case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

NOTE.—*Wilful Failure by Agent as Depriving Him of All Claim to Compensation.*—The principle in the instant case has much of authority back of it, but we do not think it is at all universally so held. Thus Sippey v. Stickney, 190 Mass. 43, 76 N. E. 226, 5 L. R. A. (N. S.) 469, 112 Am. St. Rep. 309, 5 Ann. Cas. 611, cited by the instant case, holds that wilful default by a manager of a farm to submit accurate accounts to his employer, as his contract required, does not necessarily prohibit all recovery and distinction is drawn between failure to recover under special contract for an entire sum, and wilful default in the performance of a stipulation not going to the essence of the contract.

The court said: "The ground upon which it is held that a default after part performance not going to the essence of the contract does not bar a recovery on the contract is this: Where the parties have not in terms made the performance of the stipulation in question a condition precedent of the entire price named in the contract, the court is asked to hold that by implication it was the intention of the parties that a failure to perform this stipulation which does not go to the essence of the contract should de-

feat plaintiff's right to the contract price. In such cases the court has held that by implication such cannot be taken to have been the intention of the parties, and has left the defendant to his cross-action or other remedy for such a breach."

This distinction is observed in Little v. Phipps, 208 Mass. 531, etc., cited by instant case where an agent was only deprived of a commission as to a particular matter and not as in the instant case where there was salary involved.

An old Georgia case seemingly supports the instant case, but as the court said that there was a peculiarity in the case that required special notice and which we think took it out of the general rule. Henderson v. Stiles, 14 Ga. 135.

A number of cases hold that a servant though guilty of gross wrong may recover his wages for the time he has served, for example Star Coal Min. Co. v. Maxwell, 3 Ill. App. 394; Taylor v. Patterson, 9 La. Ann. 251; Lawrence v. Gullifer, 38 Me. 532; Robinson v. Saunders, 24 Miss. 301; Harper v. Ray, 27 Miss. 622; Massey v. Taylor, 5 Coldw. (Tenn.) 447.

It may be true, that if there was wilful fraud in commissions claimed by a broker the principle applies, but we think there is a distinction between salary and commissions, and the court has been misled in failing to apply this distinction.

ITEMS OF PROFESSIONAL INTEREST.

THE HUMOROUS PHASES OF JUVENILE COURT ADMINISTRATION.

When the subject of "Juvenile Courts" was assigned to Hon. Rowland W. Baggott, Probate Judge of Dayton by the executive committee of the Ohio Bar Association in making up the program for the last annual meeting, they did not realize what a mine of undeveloped humor lay concealed under this apparently sad and serious topic.

Mr. Baggott's address was reported in the usual campaign style, and we publish large quotations from it with the interjections of the audience indicated. Mr. Baggott said:

Just exactly why I have been extended the privilege of speaking to you is beyond my conception, and when I shall have finished, it will be beyond your conception as to just why I was chosen (laughter). But I am very glad and congratulate myself upon being given the privilege of appearing before you, because, as the late Col. Ingersoll one time said, "The remarkable thing in America is that there are so many men who are willing to rise and speak in public. The only satisfying thing is that there are so many victims who are willing to listen" (laughter).

The subject upon which I desire to speak is the juvenile court, but not from an angle perhaps, that you may be expecting. It is not from the angle of so-called uplift work, or highbrow uplift work. Of course, I am not a high-stepper when it comes to that, by any means. I am opposed to that—cannot afford to be (laughter), and I realize (continued laughter) —yes, and before a meeting of lawyers we may as well be frank and honest and candid with each other—we fully realize that if such a court existed years ago, most of us would have been continually in it (laughter), and that the boys and the girls of to-day are better than they were when you and I were small. The juvenile court at that time, as you know, was usually conducted out in the barn or woodshed by father (laughter), and he had a barrel stave or bed slat in one hand, a husky chap in the other, and original thought in his mind (laughter), and it was a court of original and final jurisdiction (uproarious laughter). You could not prosecute error, or appeal from its findings, and a motion for a new trial simply resulted in a further execution of the former sentence. You paid the costs and retired from the court and the entry went on the journal finding that the matter had been dismissed without prejudice to a new action, and sometimes you were back in court the same day (laughter), and they found that by this means the children had their understanding and respect raised, the same as you and I have, and but for the neglectful, ignorant and diffident parent, in my humble estimation there would be no necessity for any juvenile court to-day (applause). And there is not, after all, a necessity for placing children on probation so much as there is of placing the parents on probation (applause).

I maintain that people cannot be improved any by the passage of an act by the legislature. It is a matter of education, a matter of intellectual development, and if I rightly understand the scheme of the juvenile court, it is its province to be educational as well as judicial. It does this, at least in the matter of dependent children alone, in Ohio. It has given them an environment which was not provided for. If you and I are permitted to dispose of our real estate by will, certainly the great state of Ohio can exercise some judgment to its future citizenship, and it is not fair to expect the child to remain in a home of dissolute parents, of profligate parents, when the chap next door has an even chance.

And the boy is never a criminal at heart. He may be a little savage, of course. He would not be worth very much if he wasn't, and he does not need punishment in many instances in the juvenile court. You and I played truant—

that does not make it right, true. We lied. Some of us stole—not you, but I say, some of us. Some of us missed Sunday school, read five cent novels and smoked cigarettes—you know the devil has always assumed all sorts of shapes and forms to tempt mankind. Did you ever start for Sunday school in winter, and when you got to the first cross street, there stood the Devil waiting for you, and he said, "Jimmie, the ice is about eight inches thick this morning" (laughter). And you remember you hid your skates at the mouth of the old sewer. Fall? Of course you fell, and you went skating, and kept your eye on the sun to see when noon came around, and when noon came you went and hid your skates and went home, and you remember, the good parents, of course, could not go to church for some reason that morning, and you were asked the text, and you told the text, and along about evening, they said, "What did you say the minister's text was?" And you had forgotten it, so you gave them another text, and that is where they caught you (laughter). They had a way, and there wasn't any juvenile court. There are not many vicious boys in the land compared with the number of population. I venture that there are less than one in three thousand in any community, vicious, malicious vandals in the way of boys, and all they want at any place is a little guidance to drive their energy in the proper channel, and if the parent neglects to do this, that is where the helpfulness of the juvenile court comes in.

So far as I am concerned, I say, without fear of contradiction, that the greatest menace to any juvenile court is the so-called volunteer probation worker. She is not—I beg your pardon, I said, "she," I mean "they" of course—but as a rule they have only one business at heart, and that is to attend to the business of the neighborhood. They spend their time going through the alleys and by-ways to ascertain how someone else lives and neglect their own affairs at home. To illustrate, one very good, excellent person in Dayton the other day called up the Humane Society and wanted a man arrested for the reason that the wagon which he was driving had become lodged in a hole and the team could not pull it out, and the driver had taken off half of the load, which she said, was an admission that he had loaded the wagon too heavily! (Laughter.) The driver was accused of cruelty, and she claimed that it was an admission on his part in taking off half of the load. That is the way the juvenile court is misinformed by the social worker. He hasn't taken the time, perhaps, to go to the bottom of all of the evidence. He hasn't listened to any of the testimony, before reaching his conclusion, and how are you to conclude when you don't know anything about it? And how difficult it is after we have heard it all, sometimes, to come to any conclusion at all (laughter)! There is shown the need of the helpfulness of the bar.

The social worker I speak of is a menace from another angle, and that is as to the disposal of the so-called delinquent girl. She hasn't the same chance in Ohio or elsewhere that her delinquent brother has. It is a funny thing, you know, that even her own sex does not come to the front for her.

Upon a certain occasion, some men took a woman to the Savior, and charged her with an offense, and as the story goes, she was writhing on the ground, and He said something, "He who is without sin amongst you, let him cast the first stone," and he looked up directly and the woman was there alone. As you remember, said He, "Does no man accuse thee?" "None, my Lord." "Neither do I accuse thee. Go thy way and sin no more." What did he know? That there must have been some guilty man; that it requires two people to commit such an offense. And He wrote his judgment in the sand, where the wind and the waves would soon obliterate it, and the Lord made no mistake then, and He has made none since.

A whole lot of sentiment has been expressed about boyhood life on the farm, as compared to boy life in the city. Great! (laughter).

The boyhood life on the farm, twenty-five years ago, was martyrdom, and torture. In those days, we had none of the comforts and the conveniences we have now, but how you like to turn back and tell your folks now of the splendid holiday spirit that used to manifest itself just about Thanksgiving time, when you had eight million relatives who came out from town, to visit you, to get a square meal—and you got up early in the morning—then you know, you went to bed when you were not sleepy and, and got up when you were (laughter)—You used to get up early in order to page the cattle up in time for their breakfast, you know (laughter), and you slipped your sockless feet in cold boots—socks were superfluous in those days, and slipped on the top stair and hit probably twice as you came down (laughter) and found that you had forgotten to fill the woodbox the night before, and you had to attend to that.

But you remember what splendid meals we had then. A boy didn't have anything but an appetite, and he used to have a million buckwheat cakes to eat for breakfast and a thou-

sand yards of country sausage—not Jones Dairy Farm sausage, at all, but the regular, sure-enough sausage (laughter), and we had the appetite to eat it, too!

And you remember you used to go out hunting after that, and keep your eye on the sun to see when you had to return, and along about 10 o'clock in the morning you came back for your dinner at noon.

Then you remember your Aunt Em used to come out, with her hair fixed in a way which gave the effect of her eyes coming just a little above where they should be, and you remember she said, "Come and kiss your Aunt Em," not for the love of the boy, but to find out whether he had been chewing tobacco out back of the corn crib, so she could tell Pa about it (laughter). She occupies the same place in principle, as the kind-hearted soul you met when you moved to town, who promised to give you a ticket to the circus for watering the elephants, and you found for every five buckets of water you carried, the elephants drank six, and you never got your ticket (laughter).

The country school house was somewhat of an attraction as it went then. If you had a slate, you never wrote anything on it except "I love you," and then nudged her and showed it to her (laughter)—wouldn't one of us want to go back to it! And we didn't have any of the country department stores that we have now, and the splendid means of gathering and disseminating news that we have now. Benjamin Franklin, writing a letter from Boston to a friend in Baltimore waited two weeks for a reply. Daniel Webster in his life never sent a telegram. Abraham Lincoln never saw an incandescent light, and that great splendid son of Ohio, William McKinley, never saw an aeroplane. General Grant never heard a phonograph. Good old days—good old—the best thing about them is that they are gone (laughter). This is the best time in which to live.

And the juvenile court is one of the new ideas we want you to grasp, for not only your own sake, but for the juvenile court's sake. See if you won't find, day after day, in the pathos of that court, and the tragedy that it has, that you have been helpful to mankind. That is the best blessing that can come to anybody. The only measure by which one can ascertain the success of man is whether he has attempted to leave the world any better than he found it. I maintain any man who has contributed to the good humor of mankind, to that extent, at least, has been a success.

BOOKS RECEIVED.

A treatise on Attorneys at Law, by Edward M. Thornton. In two volumes. Price, $12.00. Northport, Long Island, N. Y. Edward Thompson Company, 1914. Review will follow.

The Law of Evidence in Civil and Criminal Cases in Illinois. By John A. Mac Neil of the Richland County Bar. Price, $10.00. Chicago. Callaghan & Company. 1914. Review in this issue.

BOOK REVIEWS.

AMERICAN DIGEST, VOL. 17—KEY NUMBER SERIES, 1913

About the only way we may thoroughly appreciate the advantage of the key-number, that is employed by the West Company in its digests is to reflect upon what it undertakes to do not only with the great mass of matter it has published in the past but what is coming on after this in the future. Decisions by the million can never swamp it, but do make its virtues all the more excellent.

It seems impossible to say anything new about the digest, as it also seems impossible to imagine what we could do without it. A practitioner might reasonably keep up with decisions in his own state without it, but if he did that he would have to maintain a sort of card index system, that would be far less satisfactory both in a general and a particular way, and yet make him expend more time in tedious triviality, than he could afford, if his time is at all valuable.

But the key-number opens up to him access to all of the states and spurs his intellect to points in practice, pleading and principle, which the profession elsewhere makes or suggests. If the local practitioner would practice law broadly, he must be able to learn from everywhere and this is the selection of particular features, without being overwhelmed by an undigested mass.

We commend this volume 17 to our readers as pursuing the plan which seems about perfect, though we do not know whether the enterprising publishers will make a discovery that will seem so simple and practical that we will wonder, like we wonder about the key-number, why it has not been used ever since the art of printing began.

This volume is in the usual buckram binding and in every way a standard publication from West Publishing Company, St. Paul, 1914.

MacNIEL'S ILLINOIS EVIDENCE.

To our mind one of the best local works on Evidence has issued recently from the press of Callaghan & Co. It is entitled the "Law of Evidence in Civil and Criminal Causes in Illinois," and the author is Hon. John A. MacNeil, of the Richard County (Illinois) bar.

The general plan of the work is that of a digest but this work is more than a digest. The text of the decision is given in the language of the court, the reason for the rule and the concrete application and illustration of the rule. It is not a text book. You do not have to go to the volume of the report. The decision, as given in the case, is stated in the text.

While maintaining standard divisions, the work is arranged to facilitate reference to "Things By Their Right Names." The subjects, objects and instruments of evidence: Abandonment, Abstracts of Title, Account Stated, Books of Account, Burden of Proof, Chastity, Experiments, Foreign Law, Good Faith, Habits, Pecuniary Circumstances, Photographs, Physical Examination, Separate and Similar Offenses, Similar Facts, Speed, View by Jury, Witnesses, Whole of Utterance, —over four hundred equally as direct titles.

Hon. John A. MacNeil, the author, is one of the leading members of the Illinois bar, and this new work on Evidence, which has been in use for three months, has already largely added to his reputation in his home state.

Judge MacNeil was born near Kenney, DeWitt County Illinois, in 1876. He was educated at Eureka, a historic college town, and where, after his admission to the bar, he practiced law until 1901, removing to Olney where he has since resided.

Judge MacNiel has a unique record. He passed the examination for admission to the bar at the age of nineteen, was elected county and probate judge at twenty-five—at that time the youngest judge in the state—and was reelected, producing, in the meantime, two standard law books, one of which was published before he was twenty-two years of age.

His new work is a large and pretentious volume, and is a departure from old methods, giving a new classification and added interest to this phase of the law. His genius in the treatment of this age-old subject has at once landed him in the front rank of legal writers of Illinois, a state that has produced some notable names in that line of endeavor.

It is not all book-writing, however, with the author of this book, as he is well known as a trial lawyer, takes part in all political campaigns and enjoys being on the stump, and the dignified contests of the political field or forum. His accomplishments have distinguished him as one of the able men of Illinois.

Judge MacNeil's work on Evidence should have a large sale in Illinois where it will be a great convenience to the busy trial lawyer. Printed in one volume of 1564 pages on thin paper and published by Callaghan & Co., Chicago, Ill.

HUMOR OF THE LAW.

"You admit," said the magistrate, "that you entered the house of the prosecuting witness by the rear door at two in the morning?"

"Yes, Your Honor," replied the prisoner.

"What business did you have here at that time of the night?"

"I thought it was my own house."

"Then why did you, when this lady approached, leap through the window, jump into the cistern and hide yourself?"

"Your Honor, I thought it was my wife."

The chief clue that hanged Williams, the hooded murderer, was a hat of the unusual size of seven and a quarter. When the murderer of Inspector Walls was in the witness box giving evidence on his own behalf, Sir F. Low, K. C., who was prosecuting, suddenly said:

"What size hat do you take?"

"Seven and a quarter," replied Williams.

"And this hat is seven and a quarter," said the counsel, holding up the hat found near the scene of the crime.

"So I believe."

"And it is stated to have come from a shop in Bournemouth."

"Yes."

"Were you in Bournemouth at the time?"

"Yes."

"It would be a remarkable coincidence," finally said Sir F. Low, "that you should have been at Bournemouth at the time the hat was bought, that the hat should turn up in Southcliffe avenue, Eastbourne, and that you, hatless, should not be far from the spot of the murder?"

The coincidence was too strong for the jury, who had breathlessly followed this dramatic piece of evidence, and they brought in a verdict of guilty.—*Pearson's Weekly, London.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bankruptcy**—Caveat.—The filing of a petition in bankruptcy is a caveat to all the world and in effect an attachment and injunction.—In re Schow, U. S. D. C., 213 Fed. 514.

2.——Creditors.—Where, pending suit to subject to the rights of creditors a bankrupt's interest in his mother's estate, such interest was purchased by defendants from the bankrupt's trustee, the purchase was subject and not superior to the rights of such creditors.—Collier v. Seward & Roper, Va., 82 S. E. 100.

3.——Insurance.—A policy upon the life of a bankrupt husbasd is not assets in the hands of his trustee, unless it had a surrender value payable to the bankrupt alone.—Grems v. Traver, 148 N. Y. Supp. 200.

4.——Salary.—Salary earned by a bankrupt after adjudication and pending discharge does not belong to his estate unless affected by a garnishee levy, and prior assignments of such salary to creditors are ineffective.—In re Green, U. S. D. C., 213 Fed. 542.

5. **Bills and Notes**—Co-makers.—A partner who signed a note payable to his own order in his own name, and indorsed thereon his own and the firm names, thereby, in legal effect, made the firm a co-maker, and, if the indorsement of the firm name was with authority, the obligation of the firm was prima facie that of a maker.—Clement Nat. Bank v. Connelly, Vt., 90 Atl. 794.

6. **Brokers**—Fidelity to Principal.—A broker must place his principal in full possession of the facts as to his personal interest, and, if he fails to do so, the principal, though not injured, may repudiate the broker's transactions.—Cardozo v. Middle Atlantic Immigration Co., Va., 82 S. E. 80.

7. **Cancellation of Instruments**—Husband and Wife.—That plaintiff cheated, or attempted to cheat, his wife out of lands by a conveyance to his daughter without delivery was no bar to a suit to cancel the deed which the daughter fraudently obtained and recorded.—Luebke v. Salzwedel, Wis., 147 N. W. 831.

8. **Carriers of Goods**—Bill of Lading.—A provision in a bill of lading that the surrender thereof should be required before delivery of the property was intended for the protection of the carrier, and not of the shipper, and might be waived by the carrier.—Famous Mfg. Co. v. Chicago & N. W. Ry. Co., Iowa, 147 N. W. 754.

9.——Overcharge.—Where a carrier refused to deliver shipments to the consignee until the shipper paid a greater freight rate than that filed, published, and in effect, the shipper could recover the excess paid as an illegal over-charge paid under duress.—Virginia-Carolina Peanut Co. v. Atlantic Coast Line R. Co., N. C., 82 S. E. 1.

10.——Pleading.—A shipper suing the initial carrier for delay in the transportation of an interstate shipment may invoke the Carmack Amendment, though the declaration does not aver the existence of any connecting carrier, but merely asserts a common-law claim.—Norfolk Truckers' Exchange v. Norfolk Southern R. Co., Va., 82 S. E. 92.

11. **Carriers of Passengers**—Emergency.—Where a passenger was injured by the application of the emergency brake in attempting to prevent injury to a pedestrian at a crossing, the carrier was not liable, provided the trainmen were not negligent, but was liable where the use of the brake became imperative because of the prior negligence of the trainmen in failing seasonably to discover the pedestrian.—Dorr v. Lehigh Valley R. Co., N. Y., 105 N. E. 652.

12. **Chattel Mortgages**—Description.—A description in a chattel mortgage of the property mortgaged which suggests to a stranger an inquiry, if prosecuted with reasonable diligence, will lead to the identification of the property is sufficient as to him.—Slimmer v. Meade County Bank, S. D., 147 N. W. 734.

13. **Contracts**—Confidential Relations.—Confidential relations authorizing a contracting party to rely on the other's representations arise, only where one is so situated as to exercise a controlling influence over the other, or where the law, because of mutual confidence, requires the utmost good faith.—Boykin v. Franklin Life Ins. Co., Ga., 82 S. E. 60.

14.——Construction.—Where a contract is ambiguous, the practical construction placed thereon by the parties may be considered in determining their intent.—Jarvie v. Arbuckle, 148 N. Y. Supp. 189.

15.——Construction.—Provision of railroad construction contract for decision by railroad company's chief engineer of disputes under the contract, held to provide for an adjustment of all questions to the exclusion of the court's jurisdiction, and hence against public policy.—Meacham v. Jamestown, F. & C. R. Co., N. Y., 105 N. E. 653.

16.——Implication.—The law will not supply or add to a contract by implication, unless the parties have invited such assistance and addition by omission expressly to define their obligations.—Assets Realization Co. v. Howard, N. Y., 105 N. E. 680.

17.——Notice.—Where a master, through acts of his agent, became liable to a hospital for the bill of an injured employe taken to the hospital by his agent, he could not terminate his liability to the hospital by a mere notice that he would not be responsible for care and treatment "from now on."—Omaha General Hospital v. Strehlow, Neb., 147 N. W. 846.

18.——Pleading.—Whether an action for injuries to a shipper accompanying an interstate shipment is deemed an action on the contract or in tort for negligence, the rights and liabilities of the parties are based on the contract.—Fish v. Delaware, L. & W. R. Co., 105 N. E. 661.

19. **Corporations**—Executor.—A consolidated corporation was entitled to execute a trust as executor under a will naming a corporation which was consolidated into it as executor to administer the trust.—Chicago Title & Trust Co. v. Zinser, Ill., 105 N. E. 718.

20.——Exorbitant Salaries.—Where those in control of a corporation vote exorbitant salaries and over-capitalize in fraud of creditors, a court of equity may grant relief as to such transactions in an action for an accounting.—Williams v. McClave, 148 N. Y. Supp. 93.

21.——Foreign Corporations.—The state may impose such conditions as it sees fit on foreign corporations seeking the privileges of doing business in the state.—State v. Howard, Neb., 147 N. W. 689.

22. **Covenants**—Boarding House.—Keeping a boarding house was not contrary to the covenant of a deed that the property should not be used for any offensive, noxious, or dangerous trade or business.—Biggs v. Sea Gate Ass'n., N. Y., 105 N. E. 664.

23.——General Warranty.—Where a deed contains only covenants of general warranty, and none against incumbrances, the presence of incumbrances is no defense in a suit for the purchase money.—Cummings v. Hamrick, W. Va., 82 S. E. 44.

24.——Reservation to Grantor.—A deed which reserved to the grantor the possession of the premises during his life will be construed as a covenant to stand seised to uses.—Merrill v. Publishers' Paper Co., N. H., 90 Atl. 786.

25. **Criminal Law**—Res Gestae.—A statement made by defendant on his arrest as to his possession of the stolen property held admissible as part of the res gestae.—Wicker v. State, Ga., 82 S. E. 58.

26. **Customs and Usages**—Carrier of Goods.—The testimony of three merchants in a city, that it had been customary for a carrier to notify them of the arrival of perishable goods, and of two employes of the carrier, that they usually notified consignees of such arrival, held not to show such a general custom as to render as a part of the contract of shipment the duty to notify consignees of such arrival.—Seaboard Air Line Ry. v. Salios, Ga., 82 S. E. 59.

27. **Damages**—Life Tables.—Where, in an action for a permanent injury and there was evidence justifying a finding of permanent injury, life tables were properly admitted in evidence.—Oliver v. Pettaconsett Const. Co., R. I., 90 Atl. 764.

28. **Deeds**—Condition Subsequent.—A condition subsequent in a deed must either be created in express terms or by clear implication and is most strongly construed against the grantor.—Polebitski v. John Week Lumber Co., Wis., 147 N. W. 703.

29. **Divorce**—Corespondent.—Where corespondent in divorce suit, upon whom pleadings were served under the New York statutes, did not appear or defend, held, that the judgment was not an adjudication as between plaintiff and the corespondent.—Raymod v. Williston, U. S. D. C., 213 Fed. 525.

30.——Cruel Treatment.—Unfounded accusations of infidelity, made by a wife against a husband, may constitute "cruel and inhuman treatment."—Hertz v. Hertz, Minn., 147 N. W. 825.

31. **Eminent Domain**—Speculative Damages.—Upon condemnation of a tract of land for a railroad right of way, damages for the danger to persons crossing the railroad are too speculative to be considered.—Illinois Cent. R. Co. v. Roskemmer, Ill., 105 N. E. 695.

32. **Equity**—Clean Hands.—The rule which requires suitors to come into equity with clean hands does not consider inequitable conduct in different transactions a bar to relief in the particular litigation, if plaintiff is otherwise entitled thereto.—Luebke v. Salzwedel, Wis., 147 N. W. 831.

33. **Evidence**—Custom.—Judicial cognizance cannot be taken of a custom of the trade that parts of a single shipment might be returned, if they did not conform to agreement, because such custom contravenes an established rule of law.—Mendetz v. S. N. Woods & Co., 148 N. Y. Supp. 92.

34.——Declarations.—Declarations of a grantor, made subsequent to conveyances sought to be set aside as fraudulent, were competent as against his grantee.—Bushby v. Berkeley, 148 N. Y. Supp. 121.

35.——Hypothetical Question.—Hypothetical questions which do not give a clear statement of the various facts on which the opinion of the witness is to be based are improper.—Oliver v. Pettaconsett Const. Co., R. I., 90 Atl. 764.

36. **Executors and Administrators**—Embarking in Business.—Where a testator provides for the continuation of his business, only that portion of the estate devoted to carrying on the business is liable for debts so contracted.—Moore v. McFall, Ill., 105 N. E. 723.

37.——Indebtedness of Distributee.—To determine the share of each distributee, the county court may inquire as to the distributee's indebtedness to the estate and order deduction of the same from his share.—Stenson v. H. S. Halvorson Co., N. D., 147 N. W. 800.

38. **Fraudulent Conveyances**—Preference.—Where the indebtedness is bona fide, the fact that a near relative of the debtor is given a preference does not render the transaction fraudulent.—Davis v. Hincke, Ill., 105 N. E. 708.

39.——Voluntary.—A voluntary conveyance by a debtor is presumptively fraudulent as to existing creditors.—Bushby v. Berkeley, 148 N. Y. Supp. 121.

40. **Gaming**—Presumption.—The mere fact that certain stocks were purchased by decedent on margin held insufficient to raise a presumption that the contract was invalid as a

gambling transaction.—Allen's Ex'x v. Virginia Trust Co., Va., 82 S. E. 104.

41. **Gifts**—Deposit in Bank.—Where a deposit in a bank by a husband to the credit of himself and wife was changed with the consent of the wife, so as to become payable at their death, or the death of the survivor, to persons named, in amounts specified, the entries in the deposit books making the change did not amount to valid gifts inter vivos.—Baker v. Baker, Md., 90 Atl. 776.

42. **Homicide**—Intoxication.—Where there is evidence of provocation to reduce a homicide to manslaughter, evidence of intoxication may be considered, in determining whether the fatal act is to be attributed to malice, or to passion or anger.—State v. Wilson, Iowa, 147 N. W. 739.

43.——Self-Defense.—The plea of self-defense is not available to a person who seeks and brings on an affray.—Young v. State, Okla., 141 Pac. 285.

44. **Husband and Wife**—Excessive Verdict.—A recovery of $1,000 in an action for criminal conversation, where it was proven that defendant repeatedly had sexual intercourse with plaintiff's wife, was so small as to indicate want of prejudice.—Vollmer v. Stregge, N. D., 147 N. W. 797.

45.——Separate Maintenance.—A wife may compromise, for a reasonable amount, a claim against her husband for separate maintenance.—Tallmon v. Tallmon, Iowa, 147 N. W. 746.

46. **Injunction**—Ante-Election Promise.—A contract cannot be based on an ante-election promise to voters generally by a candidate for public office, so as to give a voter a right to restrain the promissor from violating same.—O'Reilly v. Mitchell, 148 N. Y. Supp. 88.

47. **Insane Persons**—Contract.—An insane person may, after being restored to reason, disaffirm and set aside a contract entered into while insane, but, if the party with whom he dealt contracted in good faith without notice of his insanity, he must return all that was received under the contract.—Merry v. Bergfeld, Ill., 105 N. E. 758.

48. **Insurance**—By-Laws.—A provision of the constitution of a benefit insurance society that, if a member neglected to pay his dues at the time specified, he should stand stricken off the roll, was self-executory, and suspended a member, without further action on the part of a local lodge.—Markman v. Independent Order Free Sons of Judah, 148 N. Y. Supp. 141.

49.——By-Laws.—Under the by-laws of a fraternal order, providing that a member who does not pay his dues for three consecutive months shall be dropped, non-payment of dues for three consecutive months ipso facto terminates membership.—Sevigny v. Societe St. Jean Baptiste, R. I., 90 Atl. 744.

50.——Estoppel.—Where insured retained the policy, he could not defeat recovery in an action on a note given for the premium.—Boykin v. Franklin Life Ins. Co., Ga., 82 S. E. 60.

51.——Indemnity.—A policy insuring against loss for injuries sustained by persons using an elevator in insured's building, and stipulating that insurer will, at his own cost, defend any suit against insured for personal injuries, relieves insured of the expense of defending actions, and insurer, by refusing to do so, breaches its contract, for which insured may recover loss sustained.—Anderson & Ireland Co. v. Maryland Casualty Co., Md., 90 Atl. 780.

52.——Injury.—Where a horse, insured under a policy against loss by death or theft, sustained a compound comminuted fracture of the femur bone of one of its hind legs, and in the opinion of a veterinary surgeon and others was incurable, the fact that plaintiff consented that it be killed in order to end its suffering was no defense to an action on the policy.—Live Stock Ins. Ass'n of Huntington v. Edgar, Ind., 105 N. E. 641.

53.——Insurable Interest.—At common law it was necessary to have an insurable interest in order to sustain a policy upon the life of another.—Grems v. Traver, 148 N. Y. Supp. 200.

54.——Material Representation.—A "material representation" in an application for insurance is one that would influence a prudent insurer in determining whether to accept the risk, or in fixing the amount of the premium.—Empire Life Ins. Co. v. Jones, Ga., 82 S. E. 62.

55.——Sole and Unconditional Ownership.—The existence of a trust deed on the property insured is only an incumbrance, and does not constitute a breach of warranty of sole and unconditional ownership.—Teter v. Franklin Fire Ins. Co., W. Va., 82 S. E. 40.

56.——Tender.—The act of a benefit association in canceling a policy excused the holder from making further tender of assessments as a condition precedent to the beneficiary's right to sue the association for damages.—Raymond v. Supreme Lodge, Knights of Pythias of the World, 148 N. Y. Supp. 76.

57.——Waiver.——An insurance company's waiver of a provision that an accident policy shall be forfeited, unless monthly premiums be paid on a certain day of each month, may be inferred from acts of the company, as well as words.—Pacific Mut. Life Ins. Co. of California v. McDowell, Okla., 141 Pac. 273.

58. **Landlord and Tenant**—Agreement by Lessee.—Agreements by a lessee to erect on the premises a building "in a manner satisfactory" to the lessor, and "in a manner to the reasonable satisfaction of the lessor," required the work to be done in such a way as ought reasonably to satisfy the lessor.—Wentworth v. Manhattan Market Co., Mass., 105 N. E. 766.

59.——Eviction.—The act of a landlord in removing, under compulsion from the municipal authorities, a stoop which furnished the only means of access to a leased store, held not a partial eviction suspending the rent during its continuance, where a new entrance was constructed.—Duhain v. Mermod, Jaccard & King Jewelry Co., N. Y., 105 N. E. 657.

60. **Libel and Slander**—Presumption of Damage.—The law presumes damages resulting from the utterance of insulting words, made actionable by the statute, as it does where the words are actionable per se; so that, to recover, proof of actual or pecuniary loss is unnecessary.—Boyd v. Boyd, Va., 82 S. E. 110.

61.——Privilege.—Both at common law and under Rev. Codes, § 3602, defining libel, in order to found liability upon a communication prima facie privileged, actual and not implied malice must be shown.—Cooper v. Romney, Mont., 141 Pac. 289.

62. **Limitation of Actions**—Personal Plea.—A member of a religious corporation which is indebted may not compel the corporation to rely on limitations to escape payment of the debt.—Heisler v. Methodist Protestant Church of Mapleton, Iowa, 147 N. W. 750.

63. **Marriage**—Contract.—The contract requisite to the creation of the marriage relation need not be expressed in any special manner, or by any prescribed form of words, but may be sufficiently evidenced by any clear and unambiguous language or conduct.—Reynoldson v. Reynoldson, Neb., 147 N. W. 844.

64. **Master and Servant** — Employment.—A letter from an employer to an employe, stating that he would be given employment in the following October, "figuring at that time on certain territory which will be mutually agreeable," did not, prior to an agreement as to the territory, constitute a binding agreement. —Watters v. Plumbers' Trade Journal Pub. Co., 148 N. Y. Supp. 52.

65. **Mortgages**—Purchaser in Possession.—A purchaser, in possession under an unrecorded executory contract for a deed, had a mortgageable interest in the property.—Simonson v. Wenzel, N. D., 147 N. W. 804.

66. **Municipal Corporations**—Defined.—Municipal corporations are independent corporate entities created by the state not only for governmental purposes, but also to do acts not governmental in their scope, though they be for the common good of the inhabitants.—In re Northern Bank of New York, 148 N. Y. Supp. 70.

67.——Negligence per se.—Violation of a sanitary ordinance, requiring merchants to confine paper in garbage cans, is not negligence per se as to a person driving along the street and injured by his horses becoming frightened at loose paper, but the act of leaving loose paper at a place from which it is blown into the street may be negligence as a matter of fact.—Bowen v. Smith-Hall Grocery Co., Ga., 82 S. E. 23.

68. **Negligence**—Joint Enterprise. — Where plaintiff and the negligent driver of a private conveyance were, at the time of plaintiff's injury from a collision at a crossing, engaged in a joint enterprise, the driver's negligence is imputed to plaintiff.—Christopherson v. Minneapolis, St. P. & S. S. M. Ry. Co., N. D., 147 N. W. 791.

69.——Proximate Cause.—Where plaintiff, on discovering that her two children had entered an elevator negligently left unattended and that it was ascending with them, was so overcome by fright that she fainted and fell into the elevator shaft, she was entitled to recover from the proprietor of the building for the resulting injuries.—Cohn v. Ansonia Realty Co., 148 N. Y. Supp. 39.

70. **Nuisance**—Abatement.—Where a nuisance is such as to be abatable when declared unlawful, its continued existence will not be presumed, and hence a party injured cannot recover permanent damages.—Chicago, I. & L. Ry. Co., v. Myers, Ind., 105 N. E. 645.

71. **Officers** — Ratification.—Public officers may ordinarily ratify such acts as they could have authorized—Mizen v. Adams County, Neb., 147 N. W. 699.

72. **Perpetuities**—Remainder Over.—Remainder over after devise in trust for husband of testatrix for life and her children and their descendants until the death of all the children and descendants of children, held to violate the rule against perpetuities.—Carpenter v. Hubbard, Ill., 105 N. E. 688.

73. **Railroads**—Cattle Guards.—Where a railroad failed to maintain cattle guards, as required by statute, and horses, because thereof, entered on the track and were killed by a train, the contributory negligence of the driver of the horses was no defense.—Burnham v. Rutland R. Co., Vt., 90 Atl. 792.

74. **Removal of Causes**—Jury.—A state may constitutionally provide for a jury of less than 12 men in its courts, or for a verdict which is not unanimous, and, notwithstanding such a provision a state court is one of "competent jurisdiction" within Judicial Code, § 28, providing that a suit brought under the Employers' Liability Act in a state court of competent jurisdiction shall not be removable.—Gibson v. Bellingham & N. Ry. Co., U. S. D. C., 213 Fed. 488.

75. **Sales**—Action for.—Where a buyer was only entitled to credit on executing notes and a chattel mortgage, he having failed to execute either, plaintiff was entitled to sue at once for the value of the goods.—O'Beirne v. Greenberg, 148 N. Y. Supp. 85.

76.——Indivisibility.—Where several lots of clothing were sold upon a single order and on one bill, and all delivered at one time, the contract was indivisible.—Mendetz v. S. N. Wood & Co., 148 N. Y. Supp. 92.

77. **Seduction**—Exemplary Damages.—In an action for seduction it is not necessary to aver exemplary damages to recover such damages.—Verwers v. Carpenter, Iowa, 147 N. W. 742.

78. **Specific Performance**—Damages.—Where a lessor filed a bill to compel specific performance of the lessee's agreement to erect a building upon the premises, and the court denied specific performance, the court may assess damages, instead of requiring the plaintiff to institute a legal action therefor.—Wentworth v. Manhattan Market Co., Mass., 105 N. E. 766.

79. **Subrogation**—Assumption of Mortgage.—One who assumes a mortgage is not entitled to an assignment on payment, but only to the production of the bond and mortgage and execution of the satisfaction.—Manilla Anchor Brewing Co. v. Raw Silk Trading Co., 148 N. Y. Supp. 119.

80. **Vendor and Purchaser** — Deficiency.—Where a sale of land was evidenced by a deed in gross and the purchaser was not induced to purchase in reliance on the vendor's statement as to quantity, the purchaser could not have an abatement of the purchase money for a deficiency in the acreage.—Cummings v. Hamrick, W. Va., 82 S. E. 44.

81.——Notice.—A purchaser from the holder of the record title is not chargeable with notice of a recorded deed made by a stranger to the record title, though he be the real owner, and though the grantor in such deed acts as agent of the record owner in negotiating the sale.—Ora v. Bane, Kan., 141 Pac. 303.

82.——Notice.—The rule that actual possession is notice of the possessor's interests has a qualified application, where he participates in a sale of the land by the legal owner, and fails to give the purchaser notice of rights not disclosed by the record or apparent from an inspection of the premises.—Pabst v. Ferch, Minn., 147 N. W. 714.

83.——Notice.—The record of a mortgage on the equitable interest of a purchaser in possession under an unrecorded executory contract for a deed, was constructive notice to a person who, with actual knowledge of the purchaser's equities, purchased an assignment of his contract.—Simonson v. Wenzel, N. D., 147 N. W. 804.

84. **Wills**—Aliunde Evidence.—Where testatrix made a gift to "Ellen Logan, * * * who has been for years my faithful and devoted nurse," and the undisputed testimony showed that the name of the one who had acted as nurse was "Mary C. Logan," the beneficiary was identified as "Mary C. Logan."—Gardner v. Viall, R. I., 90 Atl. 760.

85.——Costs.—Where a suit to construe a will did not affect the share given to a beneficiary, she should not be called on to pay any part of the costs, but the costs should be paid out of the balance of the estate.—Hirsch v. Bucki, 148 N. Y. Supp. 214.

86.——Execution.—Where a sale of land is directed by a will, expressly or by implication, at a specified time in the future, testator's legatees have no interest in the land subject to execution between the time of testator's death and the actual sale.—Greenman v. McVey, Minn., 147 N. W. 812.

87.——Gift to Class.—Gift in trust for the children of any deceased child of the testator who should attain the age of 21 or marry under that age, held as a gift to a class which vested when the oldest grandchild reached such age or married though his share might subsequently be increased by the death of other grandchildren.—Darling v. Witherbee, R. I., 90 Atl. 751.

88.——Olographic.—It is not necessary that three pieces of paper claimed to be an olographic will should be fastened together.—In re Marryfield's Estate, Cal., 141 Pac. 259.

89.——Remaindermen.—Liability of a trustee under a will to remaindermen held not extinguished by his devise of all of his property to his widow, one of the life tenants, and by her devise of her property to her children, so that on her death the share of one of such children was subject to the rights of his creditors. —Collier v. Seward & Roper, Va., 82 S. E. 100.

90.——Revocation.—A codicil will be held to revoke the will only when necessary to give full effect to its provisions.—McKinstry v. Price, Ill., 105 N. E. 750.